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# State of Utah v. Kenneth Trusty : Brief of Appellant

Utah Supreme Court

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Vernon B. Romney; Attorney for Respondent

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# In The Supreme Court of the State of Utah

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ATE OF UTAH,

*Plaintiff-Respondent*

-vs-

ENNETH TRUSTY,

*Defendant-Appellant*

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## BRIEF OF AP

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Appeal from a verdict of
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# In The Supreme Court of the State of Utah

STATE OF UTAH,

*Plaintiff-Respondent,*

-vs-

KENNETH TRUSTY,

*Defendant-Appellant.*

Case No. 12469

## BRIEF OF APPELLANT

### STATEMENT OF THE NATURE OF THE CASE

The appellant, Kenneth Trusty, appeals from the finding of guilty of the crime of murder in the second degree and from the sentence imposed upon him in the Third District Court, Salt Lake County, State of Utah on the 26th day of January, 1971.

### DISPOSITION IN LOWER COURT

On December 14, 15, 16, 17, 18 and 19, 1970, the appellant, Kenneth Trusty, was tried by a jury and was found guilty of the offense of murder in the second degree, an included offense to the offense charged.

## RELIEF SOUGHT ON APPEAL

The appellant, seeks a reversal of his conviction for the crime of murder in the second degree and an order remanding the case back to the Third District Court for a new trial with orders from this court.

## STATEMENT OF FACTS

Early in the morning of April 12, 1970, Craig Crandall, the neighbor of the appellant and appellant's wife, was shot in the head with a .22 caliber pistol and subsequently died. The appellant admitted to holding the pistol when it discharged (R. 274) but also indicated that the killing occurred in somewhat passionate circumstances. The appellant testified that immediately prior to the shooting, the appellant had argued with his wife. The appellant had suspected his wife of infidelity with the victim and confronted her with the accusation. The appellant's wife initially denied the affair but the appellant persisted and after some physical abuse, appellant's wife admitted to having had intercourse with the victim upon three occasions. (R. 270-271). Thereupon, the appellant ordered his wife to dress to go see what the victim had to say about the affair. The appellant grabbed a pistol out of his closet and with his wife went to the victim's house. (R. 271) Upon waking the victim, the appellant and his wife went into the victim's house and the appellant showed a pistol to the victim. The appellant then accused the victim of having had in-

tercourse with his wife. The victim denied the accusation but eventually stated that he had "screwed her 100 times." (R. 273-274). The pistol discharged and the bullet struck the victim in the head.

At the trial and before the appellant was sworn to testify and outside the hearing of the jury, the appellant affirmatively invoked the husband-wife privilege in anticipation of the comment thereon by the prosecutor:

> "Mr. Athay: We elect at this time to invoke the husband-wife privilege. We submit that any comment by the District Attorney with respect to the election to invoke that privilege or the failure of the wife to testify in this matter is a violation of the law of the State of Utah, the United States' Constitution, and the State statute, and I think that's very well set forth in the Utah case of *State v. Brown,* 14 Utah 2d 324, and I would like that to be shown in the record at this time." (R. 249-250)

The appellant testified on direct examination. During the cross examination of the appellant the following discourse took place:

> "'Q [By Mr. Banks]: You said everything that you said is the truth, is that right?
>
> 'A: Right.

'Q: And I assume then, your wife will testify to the same thing, is that right?

'A: I hope she testifies to the truth, that she doped me and she was having an affair with him.

'Q: So I take it then . . .

'Mr. Athay: Your Honor, I think we should approach the bench.

'The Court: You may do so.'" (R. 349-350)

Whereupon the jury left the courtroom.

Argument on the prosecutor's comment of appellant's invocation of the husband and wife privilege was had. The appellant moved the court "for a mistrial on the grounds and for the reasons that the comments and questions made by Mr. Banks with respect to the [appellant] and his wife and the deceased being the only persons who could know and testify concerning this matter . . ." (R. 357) That motion was taken under advisement by the court at that time. (R. 359)

When the jury returned to the courtroom, the judge said, "Ladies and gentlemen of the jury, any questions in regard to whether or not Mrs. Trusty will testify are to be totally disregarded by you. It is completely irrelevant in this case, and you're not to consider that point at all." (R. 359)

After the jury was charged with the case, the judge denied appellant's motion for a mistrial. (R. 507) The jury returned with a verdict finding the appellant guilty of murder in the second degree. (R. 512) The appellant was sentenced to a term of from ten (10) years to life in the Utah State Prison on January 26, 1971.

## ARGUMENT

### POINT I

### THE TRIAL COURT ERRED IN NOT GRANTING APPELLANT'S MOTION FOR A MISTRIAL MADE UPON THE GROUNDS THAT THE APPELLANT'S INVOCATION OF THE HUSBAND-WIFE PRIVILEGE WAS COMMENTED ON IN VIOLATION OF THE LAW.

At the trial, and out of the hearing of the jury, the appellant affirmatively invoked the husband-wife privilege and refused to permit the appellant's wife to testify. Subsequently, both the prosecutor and the judge made comment upon that election. The appellant submits that those comments effectively destroyed the rights of the appellant to invoke the privilege imparted him by law and thus, the appellant's right to a fair and impartial trial was prejudiced.

It is clear that the husband-wife privilege exists in Utah. The source of the privilege, however, is both

constitutional and statutory. Article 1, Section 12 of the Constitution of the State of Utah provides that, "a wife shall not be compelled to testify against her husband, nor a husband against his wife . . ." Section 77-44-4, Utah Code Annotated (1953), states that, "Neither husband nor wife shall be a competent witness for or against the other in a criminal action or proceeding to which one or both are parties, without the consent of the other, except . . . [for certain circumstances not relevant here.]" Finally, Section 78-24-8(1), Utah Code Annotated (1953), provides, in part, that, "a husband cannot be examined for or against the wife without her consent, nor a wife for or against her husband without consent; nor can either during the marriage nor afterwards be, without the consent of the other, examined as to any communication made by one to the other during the marriage . . ."

It is clear that the Utah Constitution gives to a wife the privilege not to testify against her husband and the statutes, Section 78-24-8(1), Utah Code Annotated, (1953) in particular, give the husband a privilege not to have his wife testify, irrespective of whether that testimony would be for him or against him. It is submitted that taken together, these prvileges permit the testimony of a defendant's wife only with the consent of both the defendant and his wife. If the wife refuses to testify or the defendant refuses to permit his wife to testify, then the wife cannot testify.

This court has construed the above statutory and constitutional provisions to impart that exact effect.

As this court said, "Clearly, our constitution and statutes give both the husband and the wife a privilege that the wife shall not testify under the circumstances without the consent of both the husband and wife. *State v. Brown,* 14 Utah 2d 324 at 327, 328, 383 P. 2d 930 (1963).

Although such a privilege may be waived, it is submitted that waiver is not in issue because the appellant affirmatively invoked the protection of the privilege to the court and the prosecutor out of the presence of the jury, (R. 249) and made a timely objection to the prosecutor's questions when it became apparent that the prosecutor was attempting to get the defendant to invoke the privilege to the jury. (R. 349)

It is submitted that this case at hand is almost identical to the case of *State v. Brown, supra.* In that case the appellant was prosecuted for raping a sixteen year old girl. The appellant's defense was that of alibi in that he claimed that he was home with his wife at the time the offense was committed. The wife of the appellant was not called to testify because the wife would have been excluded from the trial under the exclusionary rule. As Mr. Hansen, the attorney for the defendant in the *Brown, supra,* case, stated as Amicus Curiae at the trial, "Because of the exclusionary rule involved, we elected in his defense to have her near his side in support of him and remain in the courtroom and therefore we did not call her as a witness to corroborate his testimony that he was in fact at the home, that which

he had established as the alibi. That was the reason that she was not called." (R. 354)

At the time of the closing argument, the prosecutor stated in his summation that the appellant's wife "is the one person who could have said defendant was at home" when the attack occurred and "did not testify." 14 Utah 2d at 326. In reversing the conviction and remanding for a new trial, this court said,

> "The district attorney's comment to the jury in substance that the defendant's wife, the one person who could have testified that the defendant was home at the time that the assault occurred, did not testify was prejudicial error. The defendant objected to the comment on the ground that the wife has the privilege not to testify against her husband. The defendant claimed an alibi to the effect that at the time the State claimed he was assaulting Anita at her home in Farmington, he was with his wife in their home in Salt Lake City. But his wife who he claims was present with him at their home did not testify.
>
> "Clearly our constitution and statutes give both the husband and the wife the privilege that the wife shall not testify under these circumstances without the consent of both the husband and the wife. The cases are in hopeless confusion on whether under somewhat

> similar circumstances and statutes such comment on the failure to testify is prejudicial error. If such comment is permissible the privilege is largely destroyed. We conclude that this comment destroyed the privilege not to testify and was prejudicial." 14 Utah 2d at 327, 328.

It is submitted that the *Brown* case stands for the proposition that when comment is made upon the privilege, the privilege is destroyed, thus prejudicing the defendant and therefore *Brown* requires that the case be remanded for a new trial.

The only question which may be at issue because it is not directly covered by the *Brown* case is that of the actual comment upon the privilege. In the *Brown* case, the prosecutor commented to the jury in his closing argument. In the instant case, the prosecutor commented upon the privilege during his cross examination of the appellant. He said, "And I assume then that your wife will testify to the same thing, is that right?" (R. 349) At that point the defendant objected and after argument, made a timely motion for a mistrial (R. 349) which was later denied. (R. 507)

It is submitted that by asking that question the district attorney entered an area forbidden by *Brown*. By asking the appellant whether or not his wife would testify, the prosecutor effectively destroyed the privilege which the *Brown* case indicates is prejudicial error.

It is submitted that if any of the jurors had not been made aware that the appellant had invoked the privilege by the questions of the prosecutor, the court made sure that those jurors in fact knew. The court admonished the jurors that, "any questions in regard to whether or not Mrs. Trusty will testify are to be totally disregarded by you. It is completely irrelevant in this case, and you're not to consider that point at all." (R. 359) This admonishment could not have corrected the error committed by the prosecutor's question any more than such an admonishment could erase the comment of the prosecutor in the closing argument as in the *Brown* case. It is submitted that the admonishing comment of the court only served to engrain the fact that the appellant had invoked the privilege and, by itself, effectively destroyed the privilege and committed the prejudicial error discussed in *Brown*.

Further, if neither the question of the prosecutor nor the admonishment of the court is sufficient by itself to destroy the privilege, it is submitted that taken together, the comments did prejudice the appellant and create reversible error.

It is submitted that the privilege was commented on by the prosecutor or by the court or by both, and was thusly destroyed. The *Brown* case, *supra,* holds that the destruction of the privilege is prejudicial error. It is therefore submitted that this court must reverse the conviction of appellant and remand this case to the district court for a new trial.

## CONCLUSION

It is respectfully submitted that because the trial court erred in denying appellant's motion for mistrial which was made upon the grounds that the appellant's invocation of the husband-wife privilege was improperly brought to the attention of the jury, thus prejudicing the appellant, the judgment below should be reversed and the case should be remanded back for a new trial with instructions from this court.

Respectfully submitted

D. GILBERT ATHAY

*Attorney for Appellant*